from it. The Georgia court itself, in an earlier case (*Atlanta R. Co.* v. *Hodnett*, 29 Ga. 461) put the matter clearly when it said: "When a man has been inveigled into a contract by fraud, he may rescind it or adhere to it as he pleases. If he adheres to it, he takes it as *it is*, and not as he *might have made it*, with different information. If he rescinds it, he is entitled to compensation for all the hurt he has received *from the contract*, not from its violation."

Mr. Bigelow in his work on Fraud (Vol. 1 p. 67) also states the point clearly: "The party wronged may still find himself far from whole after a complete and consummated rescission of the contract; he may have been induced to incur expense, or to put himself to detriment, in making necessary preparations for the carrying out of the contract. If this is true—if and in so far as such expense or detriment was the natural and reasonable consequence of the fraud—it would be strange to say that a suit for such damage would be an affirmance of the contract and therefore inconsistent with a rescission of it; it simply would not be true. For such cases the law must permit and does permit, an action for damages, *with* rescission (assuming that to be possible) if the defrauded party prefer;" and he cites *Lenox* v. *Fuller* and *Warren* v. *Cole*, *supra*.

So in 14 Am. and Eng. Enc. of Law (2d ed.) p. 170, after stating the general rule that ordinarily one who rescinds cannot maintain an action for the deceit, it is said: "But, according to the better opinion, if any special damages have been sustained, so that the party defrauded is damaged notwithstanding the rescission, his rescission of the contract will not bar a recovery of such special damages," citing *Lenox* v. *Fuller*, *Warren* v. *Cole*, *Atlanta R. Co.* v. *Hodnett*, *supra*, and *Nash* v. *Minnesota Title Ins. Co.*, 163 Mass. 574, 47 Am. St. Rep. 489.

In *Warren* v. *Cole*, Campbell J. said: "This is not a suit to enforce a contract. On the contrary, it is an action of tort to recover damages for a deceit and imposition claimed to have been practiced on Cole and Arnold, whereby they were fraudulently induced to make an agreement which they would not have made had they known the truth. This being the character of the suit, it can not be seriously contended that a person repudiating a contract for fraud can not sue for redress if he has suffered damage from it."

Another point which must not be overlooked is that in the principal case the sale was to the firm while the action for deceit is against Moody only. For the purposes of the case Moody was the agent of the firm, and the question is presented whether by rescinding the contract of sale to the firm the seller is debarred from suing the agent for the deceit. This question was much discussed in *Emma Min. Co., Lim.* v. *Emma Min. Co., of N. Y.*, 7 Fed. Rep. 401, wherein all of the questions involved in the Georgia case were fully discussed, and wherein the court reached the conclusion that there is no "necessary inconsistency between an action against the agents of the vendor to recover damages for their deceit in effecting the sale, and its disaffirmance as against the vendor himself."

CORPORATIONS—RETIREMENT OF PREFERRED STOCK BY EXCHANGE OF MORTGAGE BONDS THEREFOR—ACCEPTANCE OF AMENDMENT BY MAJORITY—CONTRACTS IN WHICH DIRECTORS ARE INTERESTED—NOTICE TO THE SHARE-

HOLDERS—AUTHORIZATION BY VOTE OF SHAREHOLDERS INTERESTED IN THE CONTRACT.—The litigation growing out of the plan of the United States Steel Corporation to retire $200,000,000 of its preferred stock by issuing bonds therefor, has involved many interesting questions under the New Jersey law.

The corporation was founded in 1901, with a capital stock of $1,100,000,000. Of this, a little over $500,000,000 preferred stock, "entitled to receive, and the corporation bound to pay" seven per cent. cumulative dividends, payable quarterly, beginning April 1, 1901, was issued. The act of 1896, under which the corporation was formed, by section 29, provided that such a corporation might decrease any class of its stock "by purchase at not above par, certain shares for retirement;" also that it might purchase such personal property as its business might require. The articles of association also authorized the corporation to issue its bonds in payment for property purchased or acquired, or "in or about its business," and secure them by mortgage upon its property.

March 28, 1902, an act was passed providing, "When the consent of two-thirds in interest of each class of stockholders present in person or by proxy," at a meeting called for the purpose, a corporation "that shall have continuously declared and paid dividends at such rate on such preferred stock for the period of at least one year next preceding the meeting," and whose assets, after deducting the indebtedness, shall be at least equal to the preferred stock, may redeem the same out of bonds, or the proceeds thereof, bearing five per cent interest.

April 1, 1902, the directors voted to accept the act of 1902, and to retire $200,000,000 of the preferred stock "to the extent the holders thereof consent thereto," out of bonds to be issued therefor, and directed that a contract for that purpose be made with J. P. Morgan & Co., to become operative after the approval of the stockholders in special meeting. Preferred stockholders were given the privilege of subscribing for the bonds, and paying for them in preferred stock. If all the bonds were not subscribed for, the bankers were to have the right to take the balance, and a syndicate was formed for that purpose, the commission for which was to be $8,000,000. A stockholders' meeting was called for May 19, 1902, the notice stating that "a syndicate, *including some directors*, which will receive four-fifths" of the commission, had been formed to further the plan. At the meeting 77 per cent of all the shares were present; over 76 per cent of all, and over 99 per cent of the stock present, voted for the plan.

Dissenting shareholders immediately brought suit to enjoin carrying out the plan, on the ground that the act of 1902 was a material amendment to the charter, which impaired the contract of such shareholders with the corporation, and divested them of vested rights, by placing a mortgage ahead of their preferred shares. These contentions were overruled. (*Venner* v. *U. S. Steel Corp.*, 116 Fed. R. 1012, 17 Am. & Eng. Corp. Cas. N. S. 224; *Berger* v. *U. S. Steel Corp.*, 53 Atl. 68, 17 Am. & Eng. Corp. Cas. N. S. 54, overruling the decision of the Court of Chancery; *Berger* v. *U. S. Steel Corp.*, 53 Atl. 14, 17 Am. & Eng. Corp. Cas. N. S. 36). These cases seem to indicate a relaxation from the former strict New Jersey rule. Under the law of 1846, which provided "the charter of every corporation shall be subject to alteration, supervision, and repeal, in the discretion of the legislature," it was early held in New

Jersey (contrary to the apparent weight of authority elsewhere, *Durfee* v. *Old Colony R. R. Co.*, 5 Allen (Mass.) 230, 1 Cum. Cas. Corp. 773, 2 Smith's Cas. Corp. 750, 2 Keener's Cas. Corp. 1480, 2 Wilgus Corp. Cas. 1462; *Buffalo, etc., R. R. Co.* v. *Dudley*, 14 N. Y. 336, 2 Smith 742, 2 Wilgus, 1461) that such a provision "was to avoid the rule in the *Dartmouth College* case (4 Wheat. 518), not that in *Natusch* v. *Irving*," (Gow, Partnership, Appendix VI. p. 398, 1 Smith 226); that such a provision was not designed to enable the corporation to change the rights of members *inter sese*; nor to enable a majority to accept and enforce a material amendment against the dissenting minority, but only to permit the state to make such modification as the public welfare requires. The legislature "can repeal or suspend the charter; it can alter or modify it; it can take away the charter; but it cannot impose a new one and oblige the stockholders to accept it," (1853, *Kean* v. *Johnson*, 9 N. J. Eq. 401, 1 Keener 608; 1862, *Zabriskie* v. *R. R. Co.*, 18 N. J. Eq. 178, 90 Am. D. 617, 1 Cum. 781, 2 Keener 1487, 2 Smith 760, 2 Wilgus 1466). This same provision became a part of the revision of the New Jersey law of 1896 (C. 185, § 4, Dill, N. J. Corp. p. 12, 4th ed.), and like holdings were made under its provisions (*Mills* v. *R. R. Co.* 41 N. J. Eq. 1, 2 Atl. 453; *Newark Lib. Assoc. Cas.* 64 N. J. L. 217, 43 Atl. 435, 64 N. J. L. 265, 45 Atl. 622). In the *Venner* case (*supra*), it was held that the act of 1902, when the charter provided that the corporation might increase its bond issue "for any object in and about its business," was not unconstitutional as impairing any contract or vested right of any shareholder. In the *Berger* suit in chancery, Vice-Chancellor Emery held that the act of 1902, divested non-consenting preferred shareholders, whose certificates gave them a first lien on the corporate assets, of their vested rights by placing a bond issue secured by mortgage upon the corporate assets, in preference to the lien of the shares; that section 29 of the act of 1896 did not contemplate a general readjustment of the relations of shareholders, by allowing the issue of bonds in order to retire preferred shares, and that the act of 1902 was therefore unconstitutional as impairing the obligation of the members' contracts (53 Atl. 14). This was reversed by the Court of Errors, holding that section 29 of the act of 1896 allowed the issue of bonds for this purpose, without the limitations prescribed by the act of 1902, that the latter was *restraining only* by requiring a compliance with additional conditions, and therefore it did not divest the shareholder of any vested right, nor impair any contract with him. (53 Atl. 13). The court's line of reasoning was: Section 29, allows stock to be retired by *purchase;* if so, it can do so on *credit;* if on credit, it can give a note or *bond* for it; and the certificate of incorporation authorizes it to issue bonds in payment for property purchased by it "in or about its business;" if so, these bonds may be sold on the market; the certificate of incorporation also provides that it may mortgage any of its property "for furthering any of its objects," one of which is stated to be "the retirement of its stock." Hence, "The fact that those who do not accept will have an additional mortgage debt underlying their stock impairs no vested right. They acquired their shares subject to the provisions of the act of 1896, and the certificate of incorporation, which authorized the retirement of stock in the manner adopted." See further, Note, 2 Wilgus 1472; 3 Clark & M. §§ 630-31.

In the foregoing cases the pleadings admitted the act of 1902 had been

complied with. Afterward, Mr. Hodge brought suit to enjoin, on the ground that this act had not been complied with in that: the dividends had not been continuously paid as required; the contract with the bankers was *void*, because 15 out of 24 of the directors were interested in it; and it was not authorized by the votes of the requisite number of disinterested shares in stockholders' meeting.

As to the continuous payment of dividends, the facts showed that quarterly dividends of one and three-fourths per cent had been paid four times,—the first for the quarter beginning April 1, 1901, declared July 2, 1901, and paid August 7, 1901; the last, for the quarter ending March 31, 1902, declared April 9, 1902, paid May 15, 1902. The meeting was called for May 19,—this was 44 days less than one year after the first quarterly dividend was *declared*, and 80 days less than a year after it was *paid*. On these facts, the lower court held that dividends at the rate of seven per cent had not been declared and paid *continuously* for a year, and that if the dividends were payable yearly, at least *two* such dividends must be paid; if payable half yearly, at least *three* would be required; and if *quarterly*, at least *five*, etc. This was overruled by the Court of Errors and Appeals, holding that "dividends at the rate of seven per cent must be paid for a continuous period of one year, so that when dividends are paid quarterly, a quarterly dividend cannot be passed without losing the benefit of the act." (*Hodge* v. *U. S. Steel Corp.*, 54 Atl. 1, Feb. 18, 1903, overruling *Hodge* v. *U. S. Steel Corp.*, 53 Atl. 601, 17 Am. & Eng. C. C. N. S. 485).

The other points noted above, and of more general interest, were not passed on by the court of chancery, but the court of errors and appeals held:

1. That directors cannot lawfully enter into any contract, in the benefit of which even one of their number participates, *without the knowledge and consent of the stockholders*. This is the general rule. (3 *Clark & Mar. Corp.* §§ 758-760; *Taylor*, 5th ed. §§ 627-629; 3 *Thompson*, §§ 4059-4066. *Stewart* v. *Lehigh Valley R. R.* 9 Vr. 505; *Traction Co.* v. *Board of Works*, 27 Vr. 431).

2. That such a contract, however, is not *void*, but only *voidable* at the option of shareholders, when they have notice of the interests of the directors; and *a fortiori*, when the contract is between the directors and stockholders, or when the shareholders expressly authorize the directors to enter into the contract, with notice of their interest, it is unassailable, without actual fraud. This accords with the general rule also. (3 *Clark & Mar. Corp.* § 761; *Taylor*, 5th ed. § 630; 3 *Thompson*, § 4061; *Twin-Lick Oil Co.* v. *Marbury*, 91 U. S. 587, 2 Keener's Cas. Corp. 1510, 2 Wilgus Cas. Corp. 1750; *Munson* v. *Syracuse etc. R. R. Co.* 103 N. Y. 58, 2 Keener, 1519, 2 Wilgus, 1753; *Singer* v. *Salt Lake etc. Co.* 17 Utah 143, 70 Am. St. R. 773, 53. Pac. 1024; *New Memphis Gas L. Co. Cases*, 105 Tenn. 268, 80 Am. St. R. 880, 60 S. W. 206; *Graham* v. *Carr*, 130 N. C. 271, 41 S. E. 379). There are some holdings to the contrary. (3 *Thompson*, § 4060).

3. Shareholders are charged with notice of those things which they could ascertain by reasonable inquiry, when their attention has been called to any fact that would ordinarily induce investigation. In this case the notice calling the shareholders' meeting stated that *some of the directors* were interested in the contract with the syndicate. *Held*, that this was sufficient to put the

shareholders upon inquiry as to how many directors were interested and to what extent. This is the general rule. (*Gale* v. *Morris*, 3 Stew. 285; *Haslett* v. *Stephany*, 10 Dick. 68; *Phosphate Lime Co.* v. *Green*, 7 C. P. 43; *Doran* v. *Dazey*, 5 N. Dak. 167, 57 Am. St. R. 550; *Wishard* v. *Hansen*, 99 Ia. 307, 61 Am. St. R. 238).

4. In this case the plan to retire the stock did not receive a two-thirds vote, without counting the shares of those interested in the syndicate. *Held*, that in the shareholders' meeting, the directors were entitled to vote upon the resolution not in their fiduciary capacity, but solely in the right of the shares of stock held by them; they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company. The court did not rely particularly upon the express provision of the by-laws that contracts in which the directors were specially interested could be ratified by a majority of shareholders. The rule applied is fully sustained by the authorities. (*Leavenworth* v. *Chicago Ry. Co.* 134 U. S. 688; *Nye* v. *Storer*, 168 Mass. 53; *Bjorngaard* v. *Goodhue Co. Bank*, 49 Minn. 483, 2 Wilgus Cas. Corp. 1596; *Shaw* v. *Davis*, 78 Md. 308, 28 Atl. 619; *Grant* v. *United Kingdom Ry. Co.* 40 Ch. D. 135; *Beatty* v. *N. W. Trans. Co.*, L. R. 12 App. Cas. 589, 12 Can. Sup. Ct. 598, 11 Ont. App. 205, 6 Ont. 300; *Windmuller* v. *Stand, Dist. etc. Co.*, 114 Fed. R. 491. Compare *Gamble* v. *Water Co.* 123 N. Y. 91; *Gage* v. *Fisher*, 5 N. Dak. 297, 31 L. R. A. 557).

PHYSICAL EXAMINATION IN PERSONAL INJURY CASES.—The supreme court of Indiana, in the recent case of *Aspy* v. *Botkins* (1903),—Ind.—, 66 N. E. Rep. 462, reaffirmed and somewhat extended its holdings upon the question of the right to compel the plaintiff in an action for personal injuries, to expose his person for examination. (See article by Mr. T. H. Shastid, 1 MICHIGAN LAW REVIEW 193, 277.) The plaintiff was a woman who complained of an injury to her knee. The defendant, upon the trial, demanded that she expose her knee for examination, in the presence of the jury, by physicians called by the defendant. The trial court, upon objection, refused to make the order. Later in the trial, the plaintiff offered to exhibit her knee to the jury. Said the court: "Where the ends of justice require it, it is the duty of the court, upon a timely application, to grant a reasonable request to have the plaintiff in a personal injury case, on the penalty of a non-suit, submit to a physical examination with reference to the injury he claims to have sustained. *City of South Bend* v. *Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396, 83 Am. St. Rep. 200. The right is not, however, coextensive with the power of cross-examination, and some latitude of discretion must be recognized as existing in the trial court. Each case must rest on its own foundation, and the defendant who complains, upon appeal, that the trial court abused its discretion in refusing to make the order, must be able to present a case where it is plain that the request should have been granted. We are satisfied that error does not appear in the present instance, for the reason, if for no other, that it required the appellee, a woman, to make a quasi public exposure of her person. It is true that in this case the appel-